KAREN P. HEWITT
United States Attorney
DANIEL E. BUTCHER
Assistant U.S. Attorney
California State Bar No. 144624
Federal Office Building
880 Front Street, Room 6293
San Diego, California 92101-8893
Telephone: (619) 557-5927
daniel.butcher@usdoj.gov

Attorneys for Plaintiff
United States of America

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. AARON GONZALEZ-RECARDEZ, Defendant.	Criminal Case No. 08CR1260-JLS DATE: June 13, 2008 TIME: 1:30 p.m. JUDGE: Hon. Janis L. Sammartino CRTRM: 6 **UNITED STATES' RESPONSE AND OPPOSITION TO DEFENDANT'S MOTION TO:** **1) COMPEL DISCOVERY; AND** **2) FOR LEAVE TO FILE FURTHER MOTIONS** **TOGETHER WITH STATEMENT OF FACTS AND MEMORANDUM OF POINTS AND AUTHORITIES, AND THE UNITED STATES' MOTION FOR RECIPROCAL DISCOVERY**

COMES NOW, the Plaintiff, UNITED STATES OF AMERICA, by and through its counsel, Karen P. Hewitt, United States Attorney, and Daniel E. Butcher, Assistant U.S. Attorney, and hereby files its Response and Opposition to defendant's above-referenced motions, along with United States' Motion for Reciprocal Discovery. Said response is based upon the files and records of the case, together with the attached statement of facts and memorandum of points and authorities.

//

//

//

I.

STATEMENT OF THE CASE

On April 22, 2008, a federal grand jury returned an indictment charging defendant Aaron Gonzalez-Martinez with attempted entry after deportation in violation of 8 U.S.C. § 1326(a) and (b), and with misuse of a passport in violation of 18 U.S.C. § 1544. On April 22, 2008, the Defendant was arraigned on the Indictment and entered a plea of not guilty. The motion hearing is scheduled for June 13, 2008 at 1:30 p.m.

II

STATEMENT OF THE FACTS

On April 2, 2008, at approximately 8:45 a.m., defendant applied for admission to the United States through a pedestrian land at the San Ysidro Port of Entry. Defendant presented a United States passport in the name of another person, and claimed United States citizenship. The inspector referred defendant to secondary inspection after a query revealed that the passport was stolen.

At secondary, defendant was informed that he was an imposter to the passport. Defendant then admitted his true name. Further investigation revealed that defendant has a serious criminal record in the United States, including assault, malicious mischief, domestic violence, and possessing drugs without a prescription. Defendant was advised of his rights and invoked his right to remain silent.

III.

ARGUMENT

A. DEFENDANT'S MOTION TO COMPEL DISCOVERY

The defendant has filed a request for discovery and to preserve the evidence in this case. The United States already has provided substantial discovery in this case, and will continue to comply with its discovery obligations. The following responds to defendant's specific discovery requests.

(1) Defendant's Statements. The United States will comply with Federal Rules of Criminal Procedure 16(a)(1)(A) and 16(a)(1)(B). The United States has produced all of defendant's statements that are known to the undersigned Assistant U.S. Attorney at this date. If the United States discovers additional oral or written statements that require disclosure under Rule 16(a)(1)(A) or Rule 16(a)(1)(B), such statements will be provided to Defendant.

(2) Arrest Reports, Notes and Dispatch Tapes. As discussed, the United States will comply with Federal Rules of Criminal Procedure 16(a)(1)(A) and 16(a)(1)(B). Rule 16, however, "does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does [Rule 16] authorize the discovery or inspection of statemetns made by prospective government witnesses except as provided in 18 U.S.C. § 3500." Fed. R. Crim. P. 16(a)(2).

(3) Brady Material. The United States has and will continue to perform its duty under Brady v. Maryland, 373 U.S. 83 (1963) to disclose material exculpatory information or evidence favorable to defendant where such evidence is material to guilt or punishment. The United States recognizes that its obligation under Brady covers not only exculpatory evidence, but also evidence that could be used to impeach witnesses who testify on behalf of the United States. See Giglio v. United States, 405 U.S. 150, 154 (1972); United States v. Bagley, 473 U.S. 667, 676-77 (1985).

Brady does not, however, require that the United States open its files for discovery. See United States v. Henke, 222 F.3d 633, 642-44 (9th Cir. 2000) (per curiam). Under Brady, the United States is not required to provide: (1) neutral, irrelevant, speculative, or inculpatory evidence (see United States v. Smith, 282 F.3d 758, 770 (9th Cir. 2002)); (2) evidence available to the defendant from other sources (see United States v. Bracy, 67 F.3d 1421, 1428-29 (9th Cir. 1995)); (3) evidence that the defendant already possesses (see United States v. Mikaelian, 168 F.3d 380-389-90 (9th Cir. 1999) amended by 180 F.3d 1091 (9th Cir. 1999)); or (4) evidence that the United States Attorney could not reasonably be imputed to have knowledge or control over. See United States v. Hanson, 262 F.3d 1217, 1234-35 (11th Cir. 2001).

(4) Any Information That May Result in a Lower Sentence Under the Guidelines. The United States is not obligated under Brady, and its progeny to furnish a defendant with information which he already knows. United States v. Taylor, 802 F.2d 1108, 1118 n.5 (9th Cir. 1986). Brady is a rule of disclosure, and therefore, there can be no violation of Brady if the evidence is already known to the defendant. In such case, the United States has not suppressed the evidence and consequently has no Brady obligation. See United States v. Gaggi, 811 F.2d 47, 59 (2d Cir. 1987).

But even assuming Defendant does not already possess the information about factors which might affect his guideline range, the United States would not be required to provide information bearing on Defendant's mitigation of punishment until after Defendant's conviction or plea of guilty and prior to his sentencing date. See United States v. Juvenile Male, 864 F.2d 641, 647 (9th Cir. 1988) ("No [Brady] violation occurs if the evidence is disclosed to the defendant at a time when the disclosure remains in value."). Accordingly, Defendant's demand for this information is premature.

(5) Any Information That May Result in a Lower Sentence Under 18 U.S.C. § 3553.

The United States incorporates by reference response (4) above.

(6) The Defendant's Prior Record. The United States will comply with Fed. R. Crim. P. 16(a)(1)(D).

(7) Any Proposed Rule 404(b) Evidence. The United States has already provided Defendant with information regarding Defendant's known prior criminal offenses. The United States will disclose in sufficient time advance of trial, the general nature of any "other bad acts" evidence that the United States intends to introduce at trial pursuant to Fed. R. Evid. 404(b). To the extent possible, the United States will provide the Rule 404(b) evidence to Defendant within two weeks prior to trial. The United States will also provide notice of all impeachment evidence by prior criminal convictions as required by Fed. R. Evid. 609.

(8) Evidence Seized. The United States will comply with Fed. R. Crim. P. 16(a)(1)(E).

(9) Request for Preservation of Evidence. The United States will preserve evidence "that might be expected to play a significant role in the suspect's defense." California v. Trombetta, 467 U.S. 479, 488 (1984). To require preservation by the United States, such evidence must (1) "possess an exculpatory value that was apparent before the evidence was destroyed," and (2) "be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." Id. at 489; see also Cooper v. Calderon, 255 F.3d 1104, 1113-14 (9th Cir. 2001).

The United States will make every effort to preserve evidence it deems to be relevant and material to this case. Any failure to gather and preserve evidence, however, would not violate due process absent bad faith by the United States that results in actual prejudice to the Defendant. See Illinois v. Fisher, 540 U.S. 544 (2004); Arizona v. Youngblood, 488 U.S. 51, 57-58 (1988); United

States v. Rivera-Relle, 322 F.3d 670 (9th Cir. 2003); Downs v. Hoyt, 232 F.3d 1031, 1037-38 (9th Cir. 2000).

(10) Tangible Objects. As previously discussed, the United States has complied and will continue to comply with Rule 16(a)(1)(E) in allowing Defendant an opportunity, upon reasonable notice, to examine, inspect, and copy all tangible objects that is within its possession, custody, or control, and that is either material to the preparation of Defendant's defense, or is intended for use by the United States as evidence during its case-in-chief at trial, or was obtained from or belongs to Defendant. The United States need not, however, produce rebuttal evidence in advance of trial. United States v. Givens, 767 F.2d 574, 584 (9th Cir. 1984).

(11) Evidence of Bias or Motive to Lie. The United States incorporates by reference response (3) above.

(12) Impeachment Evidence. The United States incorporates by reference response (3) above.

(13) Evidence of Criminal Investigation of Any Government Witness. The United States incorporates by reference response (3) above.

(14) Evidence Affecting Perception, Recollection, Ability to Communicate. The United States incorporates by reference response (3) above.

(15) Witness Addresses. The United States will provide defendant with the reports containing the names of the agents involved in the apprehension and interviews of defendant. A defendant in a non-capital case, however, has no right to discover the identity of prospective Government witnesses prior to trial. See Weatherford v. Bursey, 429 U.S. , 545, 559 (1977); United States v. Dishner, 974 F.2d 1502, 1522 (9th Cir 1992), citing United States v. Steel, 759 F.2d 706, 709 (9th Cir. 1985); United States v. Hicks, 103 F.23d 837, 841 (9th Cir. 1996). Nevertheless, in its trial memorandum, the United States will provide Defendant with a list of all witnesses whom it intends to call in its case-in-chief, although delivery of such a witness list is not required. See United States v. Discher, 960 F.2d 870 (9th Cir. 1992); United States v. Mills, 810 F.2d 907, 910 (9th Cir. 1987).

The United States objects to any request that the United States provide a list of every witness to the crimes charged who will not be called as a Government witness. "There is no statutory basis for granting such broad requests," and such a request "far exceed[s] the parameters of Rule 16(a)(1)(C)."

United States v. Yung, 97 F. Supp. 2d 24, 36 (D. D.C. 2000), quoting United States v. Boffa, 513 F. Supp. 444, 502 (D. Del. 1980).

(16) Names of Witnesses Favorable to the Defendant. The United States incorporates by reference response (3) above.

(17) Statements Relevant to the Defense. The United States incorporates by reference response (3) above.

(18) Jencks Act Material. The Jencks Act, 18 U.S.C. § 3500, requires that, after a Government witness has testified on direct examination, the United States must give the Defendant any "statement" (as defined by the Jencks Act) in the Government's possession that was made by the witness relating to the subject matter to which the witness testified. 18 U.S.C. § 3500(b). A "statement" under the Jencks Act is (1) a written statement made by the witness and signed or otherwise adopted or approved by him, (2) a substantially verbatim, contemporaneously recorded transcription of the witness's oral statement, or (3) a statement by the witness before a grand jury. 18 U.S.C. § 3500(e). While the United States is only required to produce all Jencks Act material after the witness testifies, the United States plans to provide most (if not all) Jencks Act material well in advance of trial to avoid any needless delays.

(19) Giglio Information. The United States incorporates by reference response (3) above.

(20) Reports of Scientific Tests or Examinations. The United States will comply with Fed. R. Crim. P. 16(a)(1)(F).

(21) Henthorn Material. The United States will comply with its obligations pursuant to United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991).

(22) Informants and Cooperating Witnesses. The United States will disclose the identity of informants where (1) the informant is a material witness, or (2) the informant's testimony is crucial to the defense. Roviaro v. United States, 353 U.S. 53, 59 (1957). If there is a confidential informant involved in this case, the Court may, in some circumstances, be required to conduct an in-chambers inspection to determine whether disclosure of the informant's identity is required under Roviaro. See United States v. Ramirez-Rangel, 103 F.3d 1501, 1508 (9th Cir. 1997). If the United States determines that there is a confidential informant somehow involved in this case, the United States will either disclose the identity of the informant or submit the informant's identity to the Court for an in-chambers inspection.

(23) Expert Witnesses. The United States will comply with Fed. Rule Crim. P. 16(a)(1)(G).

(24) Residual Request. The United States will comply with all of its discovery obligations, but objects to the broad and unspecified nature of Defendant's residual discovery request.

C. UNITED STATES' MOTION FOR RECIPROCAL DISCOVERY

1. Rule 16(b)

The defendant has invoked Federal Rule of Criminal Procedure 16 in his motion for discovery. The United States has voluntarily complied with the requirements of Federal Rule of Criminal Procedure 16(a). Thus, the 16(b) provision of that rule, pertinent portions of which are cited below is applicable.

The United States hereby requests the defendant permit the United States to inspect, copy, and photograph any and all books, papers, documents, photographs, tangible objects, or make copies of portions thereof, which are within the possession, custody, or control of the defendant and which he intends to introduce as evidence in his case-in-chief at trial.

The United States further requests that it be permitted to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with this case, which are in the possession or control of the defendant, which he intends to introduce as evidence-in-chief at the trial or which were prepared by a witness whom the defendant intends to call as a witness. The United States also requests that the Court make such orders as it deems necessary under Rules 16(d)(1) and (2) to insure that the United States receives the discovery to which it is entitled.

2. Rule 26.2

Federal Rule of Criminal Procedure 26.2 requires the production of prior statements of all witnesses, except the defendant. The new rule thus provides for the reciprocal production of Jencks statements. The United States hereby requests that the defendant be ordered to supply all prior statements of defense witnesses by a reasonable date before trial to be set by the Court. This order should include any form these statements are memorialized in, including but not limited to, tape recordings, handwritten or typed notes, and reports.

IV.

CONCLUSION

For the foregoing reasons, defendant's motions should be denied where indicated, and the United States' motion for reciprocal discovery granted.

DATED: June 6, 2008

Respectfully Submitted,

KAREN P. HEWITT
United States Attorney

s/ Daniel E. Butcher
DANIEL E. BUTCHER
Assistant United States Attorney
Attorneys for Plaintiff
United States of America
Email: daniel.butcher@usdoj.gov

KAREN P. HEWITT
United States Attorney
DANIEL E. BUTCHER
Assistant U.S. Attorney
California State Bar No. 144624
Federal Office Building
880 Front Street, Room 6293
San Diego, California 92101-8893
Telephone: (619) 557-5927
daniel.butcher@usdoj.gov

Attorneys for Plaintiff
United States of America

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. AARON GONZALEZ-RICARDEZ Defendant.	Case No. 08cr1260-JLS CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

I, Daniel E. Butcher, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of United States' Response and Opposition to Defendant's Motion to: (1) Compel Discovery together with Statement of Facts and Memorandum of Points and Authorities, and Government's Motion for Reciprocal Discovery on the following party by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

1. William B. Burgener

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 14, 2008

s/ Daniel E. Butcher
Daniel E. Butcher